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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 680

HARVEY ALUMINUM, INC., AND HARVEY MACHINE CO., INC.,

Petitioners,

vs.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED AND REYNOLDS METALS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

HYMAN I. FISCHBACH,
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Petitioners,

vs.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED AND REYNOLDS METALS COMPANY

Respondents and Appellants Below

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Harvey Aluminum Inc. and Harvey Machine Co., Inc. pray that a writ of certiorari issue to review the order and judgment entered March 16, 1953 in Appeal No. 22624 in the United States Court of Appeals for the Second Circuit entitled "Harvey Aluminum Inc. and Harvey Machine Co., Inc., Plaintiffs-Appellees, against American Cyanamid

Company, Berbice Company Limited and Reynolds Metals Company, Defendants-Appellant," reversing orders of the United States District Court for the Southern District of New York (1) denying defendants' motion to vacate plaintiffs' notice of voluntary dismissal of this action and (2) denying defendants' motion for an injunction.

Statement of Matters Involved

This action was brought on December 5, 1952 by Harvey Aluminum Inc. against American Cyanamid Company for specific performance of an agreement made November 26, 1952 to sell the tangible assets of Cyanamid's subsidiary Berbice Company Limited, a corporation of British Guiana, for the agreed purchase price of $400,000. The assets in controversy consist of extensive facilities in British Guiana for the mining and processing of bauxite ore on lands of the British Crown in that colony.

Upon filing its complaint, and the undertaking required by the district court, Harvey Aluminum obtained an ex parte order temporarily restraining the transfer of such assets by Cyanamid to anyone other than plaintiff pending plaintiff's application for an injunction pendente lite (R. 39-58). However, when that application came on for hearing, it was shown that on the day this action was begun Cyanamid's subsidiary Berbice had accepted payment of the purchase price from Reynolds Metals Company, in consideration of which it was agreed that on December 22, 1952 it would transfer such assets to Reynolds (R. 60). The district court granted the plaintiff leave to add Harvey Machine Co., Inc. and Berbice Company Limited as additional parties plaintiff and defendant, respectively, while such hearing was in progress. Upon denying plaintiffs' motion for a preliminary injunction, the district court noted that Reynolds Metals Company, although then not a party, had actual notice of plaintiffs' claim to the prior purchase of the

Berbice properties, and thereupon granted plaintiffs leave to join their separate claim against Reynolds with the claim upon which the action was originally brought (R. 113-115). Accordingly, Reynolds was brought in as an additional party defendant on plaintiffs' charge that Reynolds had tortiously induced Cyanamid and Berbice to breach their agreement to sell the Berbice properties to plaintiffs (R. 107-111). Relief against Reynolds was sought only in the alternative that, if Cyanamid and Berbice were not required to specifically perform their agreement with plaintiffs, Reynolds be decreed a trustee ex maleficio of the agreement which it made with said defendants on December 5th and hold any title received thereunder for the plaintiffs' benefit (R. 110-111).

Upon the entry in the district court of the order denying plaintiffs' motion for a preliminary injunction on December 17, 1952, plaintiffs filed a notice of appeal and applied to Judge Augustus N. Hand for, but did not obtain, a stay to prevent the transfer by Cyanamid and Berbice of title to the property in controversy. Plaintiffs' appeal from the district court's denial of their application for a preliminary injunction became moot by the transfer of such title on December 22nd. Plaintiffs therefore abandoned their appeal and neither docketed nor otherwise perfected it.

Thereafter the time of the defendants to answer the complaint was extended as to Cyanamid and Berbice until January 19 and as to Reynolds as to February 2, 1953. Appropriate orders of the court were entered by stipulation of counsel on January 2, 1953 (R. 129, 130).

On January 16, 1953 defendants, despite the provisions of Rule 65 of the Federal Rules of Civil Procedure, obtained without bond an ex parte order from the district court temporarily restraining plaintiffs and directing them to show cause why they should not be permanently enjoined from commencing or prosecuting any action in British Guinea

or in any other jurisdiction involving the property in controversy. (R. 15-17).

Before defendants' motion came on for hearing, plaintiffs voluntarily filed a notice of dismissal of the entire action, pursuant to the authority of Rule 41(a)(1) of the Federal Rules of Civil Procedure, and served copies thereof upon counsel for all defendants. (R. 131). None of the defendants had either answered or made a motion for summary judgment prior therto.

On January 20, 1953 defendants' motion to enjoin plaintiffs from bringing an action in any other jurisdiction was heard and denied by the district court. (R. 17). Later the same day, on defendants' application, the district court issued an order requiring plaintiffs to show cause forthwith why the notice they had previously filed voluntarily dismissing this action should not be vacated. (R. 4-5). After hearing thereon, the district court denied defendants' motion. (R. 5).

Defendants thereupon appealed to the Court of Appeals and on January 26, 1953 obtained from Judge Augustus N. Hand a temporary stay enjoining plaintiffs from bringing any other suit with respect to the property in controversy in British Guinea or elsewhere against any of the defendants. Immediately after obtaining such stay, defendants themselves initiated proceedings in British Guinea in an attempt to transfer to Reynolds the mining leases and concessions Cyanamid and Berbice had agreed originally to surrender, or, if governmental and other requisite consent therefor could be obtained, to transfer to plaintiffs. On February 13, 1953, after hearing argument on the merits of defendants' appeals, the Court of Appeals issued an order modifying in part the stay previously granted against plaintiffs by allowing them to take any

steps in British Guinea that might be necessary to contest such proceedings.

On March 16, 1953 the Court of Appeals reversed the orders of the district court from which defendants appealed and remanded the case to the district court with the direction that plaintiffs' notice of dismissal be vacated, that defendants' motion for an injunction be determined in the exercise of discretion, and that pending such determination the stay granted by the Court of Appeals, as modified, continue in effect.

The opinion of the Court of Appeals has not yet been officially reported. A copy of such opinion is printed as an appendix to the brief submitted herewith.

Jurisdiction

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254. Jurisdiction of the district court was invoked under Title 28, United States Code, Section 1332, and was based upon the diversity of the citizenship of the parties and the amount in controversy.

Questions Presented

1. Do the provisions of Rule 41(a)(1) of the Federal Rules of Civil Procedure grant the plaintiff the unqualified right to dismiss without court order a civil action not subject to the provisions of Rule 23(c) or Rule 66 by filing a notice of dismissal before service by any adverse party of an answer or motion for summary judgment where the dismissal of such action is not governed by any statute of the United States?

2. May the provisions of such Rule be availed of by the plaintiff to so dismiss such an action after application for interlocutory relief has been made by plaintiff and extensive hearings have been had thereon?

3. Is a notice of dismissal so filed in such an action effective to dismiss it.

(a) as to parties defendant against whom such interlocutory relief had been sought?

(b) as to parties added as defendants after the conclusion of hearings upon plaintiff's application for interlocutory relief and against whom the only claim asserted was a separate claim for alternative relief?

4. Did the plaintiffs' filing of their notice of dismissal terminate this action?

Reasons Relied On for Granting Writ

1. The decision of the Court of Appeals is in conflict with applicable decisions of this court and with the express provisions of the Rules adopted to govern the procedure in the District Courts in civil actions.

2. The decision of the Court of Appeals establishes criteria in the exercise of the right of a litigant to dismiss his suit which are contrary to long established rules and clearly enunciated judicial policy. Additionally such decision imposes restrictions upon the dismissal of civil actions without order of court beyond those which were prescribed by this court to govern such matters. In so doing the Court of Appeals has so far departed from the prescribed and usual course of judicial proceedings as to warrant the exercise of this court's supervisory power to govern procedure in the District Courts.

3. The questions of Federal law with which the decision herein deals are substantial and important in the conduct of civil litigation in the District Courts. Prior to the decision herein, the Rules governing such questions had been uniformly construed to preserve the right of a plaintiff to a voluntary dismissal in the circumstances and at the time

prescribed. The meaning and the application of the standards established by the amendments to the Rules adopted by this Court in 1948 are rendered doubtful and uncertain by the decision. The decision of the Court of Appeals on these questions conflicts with its own prior decisions and with the decision of another Court of Appeals on the same subject matter. The questions presented herein should be settled by this Court.

Respectfully submitted,

HYMAN I. FISCHBACH,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 680

HARVEY ALUMINUM INC. AND HARVEY MACHINE CO., INC.,

Petitioners,

vs.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED AND REYNOLDS METALS COMPANY,

Respondents and Appellants Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Court of Appeals has not yet been officially reported. A copy of such opinion is included in the appendix hereto.

Jurisdiction

1. The date of the opinion to be reviewed is March 16, 1953.

2. Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254.

Statement of the Case

A statement of the matter involved has already been made in the petition which accompanies this brief under the heading "Statement of Matters Involved." Such statement is respectfully incorporated herein.

Specification of Errors

1. The Court of Appeals erred in holding that plaintiffs, after application for interlocutory relief upon which extensive hearings had been had, could not without order of court dismiss this action pursuant to Rule 41(a)(1) by filing a notice of dismissal before service by any adverse party of an answer or motion for summary judgment.

2. The Court of Appeals erred in holding that the voluntary dismissal filed by plaintiffs herein was ineffective to dismiss this action.

3. The Court of Appeals erred in holding that Rule 41(a)(1) did not authorize plaintiffs to dismiss this action without order of court as against the defendant Reynolds Metals Company.

4. The Court of Appeals erred in reversing the order of the District Court denying defendants' motion to vacate their notice of dismissal and in remanding the case with direction to vacate plaintiffs' notice of dismissal.

5. The Court of Appeals erred in reversing the order of the District Court denying defendants' motion for an injunction and in remanding it for hearing.

ARGUMENT

Point I

At the Time Petitioners Filed the Notice of Dismissal, They Had an Absolute Right to Dismiss Their Action

The applicable Federal Rule of Civil Procedure provides:

> "*Rule 41. Dismissal of Actions*
>
> (a) *Voluntary Dismissal: Effect Thereof*
>
> (1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs * * *."

Plaintiffs' notice of dismissal was filed prior to the service by any of the adverse parties of an answer or a motion for summary judgment. This action is not subject to Rule 23(c) (relating to class actions) nor to Rule 66 (relating to actions in which a receiver has been appointed). Accordingly the nature and status of the action when the notice of dismissal was filed was such as to squarely and literally permit its dismissal by plaintiffs without order of court in accordance with the provisions of Rule 41(a)(1).

Cone v. *West Virginia Pulp & Paper Company*, 330 U. S. 212;

Jones v. *Securities & Exchange Commission*, 298 U. S. 1;

Pennsylvania R. Co. v. *Daoust Const. Co.*, 193 F. 2d 659 (7th Cir., 1952);

Kilpatrick v. *Texas & P. Ry. Co.*, 166 Fed. 2d 788 (2d Cir., 1948);

Venner v. *Graves*, 255 Fed. 686 (2nd Cir., 1919);

Wilson & Co., Inc., v. *Fremont Cake & Meal Co.*, 83 F
Supp. 900 (D.C. Neb., 1949);
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Fleetwood, et al. v. *Milwaukee Mechanics Ins. Co.*,
F.R.D. 680 (D. C. W. D. Mo., 1947);
Sachs v. *Italia Societa Anonima de Navigazione*, 30 F
Supp. 442 (D. C. N. Y., 1939).

Despite the Rule and the application and constructio
thereof by the Federal Courts, the Court of Appeals hel
the dismissal herein could not be filed as of right and
nullity which should be vacated.

Point II

**Petitioners' Application for Interlocutory Relief and th
Hearings Thereon Did Not Affect Their Right to Dismis
This Action Without Order of Court**

It was the opinion of the Court of Appeals that Rule 41(a
(1) should not be literally applied herein because of th
extensive hearings held on plaintiffs' application for a pre
liminary injunction and, therefore, although the voluntary
dismissal was filed prior to the service of an answer o
motion for summary judgment, the dismissal should b
vacated. It was also the view of the Court of Appeals tha
plaintiffs' application for interlocutory relief barred th
voluntary dismissal of this action even as against a party
added as a defendant herein after such action had beer
concluded notwithstanding the claim asserted against such
defendant was separate, distinct and solely in the alterna
tive. It is respectfully urged that the opinion of the Cour
of Appeals is fraught with error.

The general rule as to voluntary dismissals is set forth in 27 C.J.S. Sec. 8, at pp. 161-2:

> "A statute authorizing a dismissal or non-suit will, generally, be liberally construed in favor of the right of plaintiff to dismiss or take a non-suit since it is the policy of the government to discourage rather than to encourage, litigation; * * * On the other hand a statute prohibiting the dismissal or the granting of a non-suit, being in derogation of the common law, must be strictly construed and will not be extended to include cases not within its express terms. [Citing cases.]"

The applicable Federal Rule of Civil Procedure authorized plaintiffs to dismiss this action without order of court "*at any time* before service by the adverse party of an answer or motion for summary judgment." Nonetheless, the Court of Appeals viewed plaintiffs' dismissal of this action without order of court as "unauthorized", "arbitrary", and as filed at "an advanced stage."

The holding of the Court of Appeals is an unauthorized and unwarranted invasion of the rights reserved to a plaintiff by the provisions of the Rule and is squarely in conflict with decisions of this Court.

In *Cone* v. *West Virginia Pulp & Paper Company*, 330 U. S. 212, 215, this Court said:

> "Rule 41(a)(1) preserves this unqualified right of a plaintiff to a dismissal without prejudice prior to the filing of defendant's answer."

See also, *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 19.

Point III

The Filing of the Voluntary Dismissal Rendered This Case Moot

Plaintiffs' notice of dismissal was filed and served on all parties to this action before defendants' motion for an in-

junction came on for hearing in the district court. It was entirely appropriate, when notwithstanding plaintiffs' dismissal of the action defendants pressed for a determination of their motion, that the district court should have denied it, even if not in the exercise of discretion.

It has long been well settled that the "voluntary dismissal of a suit leaves the situation so far as procedures therein are concerned the same as though the suit had never been brought." *A. B. Dick Co.* v. *Marr*, 197 Fed. 2d 498, 502 (2nd Cir., 1952) (citing *Maryland Casualty Co.* v. *Latham*, 41 Fed. 2d 312, 313 (5th Cir., 1930)).

See also, *Bryan* v. *Smith*, 174 Fed. 2d 212, 214 (7th Cir., 1949).

Such dismissal effectively terminated the authority of the District Court to grant relief in the action for the reason that the case had become moot.

U. S. v. *Alaska S. S. Co.*, 253 U. S. 113, 116.

Since the dismissal so filed was authorized by Rule 41 (a)(1), it was clear error on the part of the Court of Appeals to have entertained defendants' appeal from the district court's denial of such motion, and it was likewise error for the Court of Appeals to reverse the order of the district court and remand defendants' motion for an injunction for hearing.

Conclusion

A writ of certiorari as prayed for in the petition herein should be allowed.

Respectfully submitted,

HYMAN I. FISCHBACH,
Counsel for Petitioners.

APPENDIX "A"

Opinion of the United States Court of Appeals for the Second Circuit

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 22624

HARVEY ALUMINUM INC., AND HARVEY MACHINE CO., INC., Plaintiffs-Appellees,

v.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED, AND REYNOLDS METALS COMPANY, Defendants-Appellants

OPINION—March 16, 1953

Before Augustus N. Hand, Chase and Frank, Circuit Judges

Appeal from the United States District Court for the Southern District of New York, John W. Clancy, Judge

From an order denying defendants' motions to vacate plaintiffs' notice of voluntary dismissal and from an order denying defendants' motion for a preliminary injunction, the defendants appeal. Reversed and remanded.

Donovan Leisure Newton Lumbard & Irvine, Attorneys for Defendants-Appellants, American Cyanamid Company and Berbice Company Limited; Walter R. Mansfield, William C. Garrett and Robert F. Morton, Counsel.

Lundgren, Lincoln, Peterson & McDaniel, Attorneys for Defendant-Appellant Reynolds Metals Company.

Hyman I. Fischbach, Attorney for Plaintiffs-Appellees Harvey Aluminum Inc., and Harvey Machine Co., Inc.; Hyman I. Fischbach and Vincent J. Crowe, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

This action was brought on December 5, 1952 by Harvey Aluminum Inc. (hereafter referred to as "Harvey"),

against American Cyanamid Company (hereafter referred to as "Cyanamid") seeking specific performance of an alleged agreement to sell the tangible assets of Cyanamid's subsidiary Berbice Company Limited (hereafter referred to as "Berbice"). These assets consist of facilities for the processing and mining of bauxite ore from certain land in British Guiana. At the time of the filing of its complaint Harvey obtained an *ex parte* temporary restraining order pending the hearing and determination of its motion for an injunction *pendente lite* against the sale or transfer of the assets in question by Cyanamid to anyone other than the plaintiff. At the conclusion of a hearing before Judge Sugarman, during the course of which Harvey Machine Co., Inc., and Berbice were added as parties plaintiff and defendant respectively, plaintiffs' motion for a preliminary injunction was denied. The district court found, *inter alia*, that the plaintiffs' chances of success on the ultimate trial were "remote, if not completely nil." On December 15, after the temporary stay had been dissolved by Judge Sugarman, an amended complaint was filed by the plaintiffs adding Reynolds Metals Company (hereafter referred to as "Reynolds") as a defendant and seeking as additional relief that any assets received by Reynolds from Berbice be subjected to a trust in favor of the plaintiffs. On December 17 notices of appearance were filed on behalf of all three defendants. On the same day plaintiffs filed a notice of appeal from Judge Sugarman's order denying a preliminary injunction, also entered on December 17. An application by the plaintiffs for a stay pending appeal was denied by Judge Augustus N. Hand on December 18, and on December 22 Berbice transferred its assets to the defendant Reynolds. Nothing has been done either to perfect or dismiss the appeal. Fearing that the plaintiffs were about to bring suit in British Guiana, the defendants obtained an *ex parte* order from Judge Conger on January 16, 1953, temporarily staying the plaintiffs and directing them to show cause why they should not be enjoined from commencing any legal proceeding in any other jurisdiction involving the same subject matter. On January 19, prior to the return day of the order to show cause, the plaintiffs

filed a notice of dismissal stating that they "hereby voluntarily dismiss this action as against all defendants." Judge Clancy on January 20, 1953 denied a motion by the defendants to vacate this notice of dismissal, and also denied the defendants' motion for injunctive relief without opinion. This appeal is from the district court's denial of these two motions. An order to show cause containing a temporary stay against the bringing of any legal proceeding by the plaintiffs involving the same questions outside of this jurisdiction was issued by Judge Augustus N. Hand on January 26, and on the hearing of the order to show cause a motion for a stay pending the disposition of the defendants' appeal was granted by this court on February 3. Following the temporary stay against the plaintiffs the defendants initiated proceedings in British Guiana to secure the consent of the government there to the transfer of certain leases. On February 13 an order was issued modifying the stay previously granted against the plaintiffs by allowing them to take any steps that might be necessary to contest these proceedings.

The plaintiffs contend that their attempted voluntary dismissal without a court order was authorized by Rule 41(a) 1 of the Federal Rules of Civil Procedure which provides that: " * * * an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment * * *." The purpose of this rule is to facilitate voluntary dismissals, but to limit them to an early stage of the proceedings before issue is joined. 5 Moore's Fed. Practice 1007 (2d ed.). The amount of research and preparation required of defendants was stressed by the Committee Note when Rule 41(a) 1 was amended in 1948 as a reason for adding the reference to a motion for summary judgment. 5 Moore's Fed. Practice 1005 (2d ed.). The hearing before Judge Sugarman on the plaintiff's motion for a preliminary injunction required several days of argument and testimony, yielding a record of some 420 pages. Further, the merits of the controversy were squarely raised and the district court in part based its denial of the injunction on its con-

such governmental consent would in any way prejudice the plaintiffs' rights, we think that this is an additional circumstance requiring the exercise of the discretion of the district court. Accordingly, the denial of the defendants' motion for a preliminary injunction is reversed and the case is remanded for a hearing thereon. Pending the hearing and determination of this motion the stay heretofore granted by this court, as modified, will continue in effect. But the continuance of this stay is not to be regarded as in any way intimating an opinion of this court as to whether the district court should or should not issue the injunction.

Reversed and remanded.

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1952

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HARVEY ALUMINUM INC. and HARVEY MACHINE CO., INC.,
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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The orders of the United States District Court for the Southern District of New York were entered without opinion (R. 5, 17). The opinion of the Court of Appeals (AUGUSTUS N. HAND, *J.*, *R.* 132-137; all concurring) has not yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 16, 1952 (R. 137). The peti-

tion for a writ of certiorari was filed in this Court on March 28, 1953. The petitioners seek to invoke the jurisdiction of this Court under Title 28 of the United States Code, Section 1254(1).

Questions Presented

(1) Did the Court of Appeals for the Second Circuit properly hold that the notice of voluntary dismissal filed by the petitioners (plaintiffs below) without application to the District Court for an order, was ineffective to dismiss their action against the respondents American Cyanamid and Berbice Company Limited.

(a) When respondents, while not filing a paper labelled "answer," had filed detailed affidavits and given exhaustive testimony fully answering petitioners' claim on the merits;

(b) When the issues presented by petitioners' action had been litigated at length on petitioners' motion for a preliminary injunction, and findings of fact and conclusions of law had been made thereon;

(c) While an appeal in the action was still pending in the Court of Appeals?

(2) Did the Court of Appeals for the Second Circuit properly hold that the notice of voluntary dismissal filed by the petitioners (plaintiffs below) without application to the District Court for an order, was ineffective to dismiss their claim against the respondent Reynolds Metals Company in the action:

(a) When the notice of dismissal does not purport to dismiss the claim against Reynolds alone;

(b) When Rule 41(a)(1) under which the notice of dismissal was served relates to the dismissal of an entire action and not to dismissal of a single party in an action, which requires a Court order under Rule 21;

(c) When the notice of voluntary dismissal filed by the petitioners purporting to dismiss the action as against all the respondents (defendants below) was held ineffective as to respondents American Cyanamid Company and Berbice Company Limited, and when Reynolds was an indispensable party to the action brought by the petitioners;

(d) When Rule 21, which relates to the dismissal or dropping of a single party, provides a safeguard against a multiplicity of actions, with the danger of conflicting decisions by requiring an order of Court?

Rules of Civil Procedure Involved

The pertinent rules of the Federal Rules of Civil Procedure, 28 U. S. C. A., involved are:

(1) "*Rule 21. Misjoinder and Non-Joinder of Parties*

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

(2) "*Rule 41. Dismissal of Actions*

(a) Voluntary Dismissal: Effect Thereof

(1) By Plaintiff; by stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service

by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. * * *"

(3) *"Rule 73. Appeal to a Court of Appeals*

(a) * * *.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949."

Statement

This action was commenced by petitioner Harvey Aluminum Inc., a California corporation, in the United States District Court for the Southern District of New York against respondent American Cyanamid Company, a Maine corporation, on December 5, 1952, by service of a temporary restraining order obtained *ex parte,* a motion for a preliminary injunction with supporting affidavits, and a verified complaint (R. 39-58). The complaint prayed for specific performance of an alleged oral contract to sell Harvey Aluminum, Inc. the "physical assets" of Cyanamid's subsidiary Berbice Company Limited, consisting of equipment and facilities in British Guiana for mining bauxite ore, (R. 60-62).

On December 9, 1952, in answer to Harvey Aluminum, Inc.'s motion for a preliminary injunction, which sought to restrain Cyanamid from selling the physical assets of Berbice (R. 39-41), Cyanamid served six detailed affidavits, together with exhibits (R. 59-104), denying the agreement alleged and putting in issue all the material allegations of the complaint.

A hearing upon the motion for a temporary injunction was held before Hon. SIDNEY SUGARMAN, United States District Judge, which occupied five days of testimony and argument, December 9, 1952 to December 14, 1952 (R. 9, 18, 116), and concerned the basic issue whether a binding contract had been made. Testimony of officials of petitioners and of all the respondents herein was taken, and the transcript of the record of this hearing comprised over 420 pages (R. 9).

On December 12, 1952, during the hearing, Berbice was joined as a party defendant, on its consent, and on December 13, 1952, Harvey Machine Co., Inc., was joined as a party plaintiff and thereafter participated in the hearing.

On December 14, 1952, Judge SUGARMAN denied the motion for a preliminary injunction. dissolved the temporary restraining order, and on December 17, 1952, he made and signed detailed findings of fact and conclusions of law, finding, *inter alia,* that the parties never intended to enter into any agreement other than a written contract; that the only document offered by the petitioners as a memorandum of the alleged contract was insufficient; that no written contract was ever entered into; and that petitioners' prospects of success in the ultimate trial of this action were "remote, if not completely nil." (R. 21, 23). On December 17, 1952, the order denying the motion for a preliminary injunction was entered (R. 116).

Meanwhile, on December 14, 1952, upon the petitioners' application, an order was entered under which petitioners

were permitted to join Reynolds Metals Company as a party defendant and Harvey Machine Co., Inc. and Berbice Company Limited were formally joined as parties (R. 113). On December 15, 1952, an amended complaint was served containing, in addition to the claim for specific performance against Cyanamid and Berbice, a separate claim against Reynolds seeking to impose a trust upon Reynolds as to assets of Berbice which Reynolds had agreed to purchase (R. 105-112).

On December 17, 1952, immediately following the entry of the order denying their motion for a preliminary injunction, the petitioners filed a notice of appeal to the Court of Appeals for the Second Circuit (R. 123) and made application for a stay or temporary injunction pending appeal (R. 11). This was denied by Judge AUGUSTUS N. HAND (R. 11) and since that time, petitioners have taken no steps to pursue or dismiss their appeal (R. 133).

On December 22, 1952, Berbice's assets were transferred to Reynolds pursuant to their contract.

On January 13, 1953, the petitioners served notice that the depositions of seventeen officers and employees of respondents would be taken on January 21, 1953.

Prior to January 16, 1953, the respondents were informed by their respective representatives in British Guiana, that the petitoners were about to institute legal action in British Guiana involving the same issues being litigated in New York (R. 18-20, 27, 28). The uncontroverted record shows that such action in British Guiana would subject respondents to great, immediate and irreparable damage involving the operation of the properties, and also cause great expense and harassment as it would require many important officials of respondents to go thousands of miles to a place with which communications are extremely difficult, to litigate the same issues as can be disposed of in the present action. (R. 12, 13, 19, 20).

To prevent such damage from multiplicity of actions, the respondents sought and obtained an order to show cause, containing a temporary order restraining the petitioners from commencing any action, suit, or legal proceeding in any other jurisdiction involving the same subject matter, facts and parties, and seeking a permanent injunction against the petitioners (R. 15-17). This order to show cause was served upon the petitioners on January 16, 1953 (R. 15-17). On January 19, 1953, the petitioners, after being served with said restraining order, filed a notice of dismissal of the instant action without leave of court (R. 131).

On January 20, 1953, respondents obtained an order to show cause why the notice of dismissal should not be vacated (R. 4, 5), and on that day both this motion to vacate and the motion for a restraining order against legal proceedings elsewhere were denied by Judge JOHN W. CLANCY (R. 136).

Respondents appealed from both of said orders of Judge CLANCY, and the Court of Appeals directed that the appeals be heard on February 12, 1953. On February 13, 1953, the restraining order of Judge HAND was modified to permit the petitioners to contest the proceedings then pending in British Guiana to obtain the consent of the British Government to the transfer or recordation of certain leases from Berbice to Reynolds.

On March 16, 1953, the Court of Appeals reversed both orders of Judge CLANCY and remanded the case to the District Court with the direction that the notice of dismissal without leave of court be vacated, and with leave to the petitioners to move to dismiss the action under Rule 41(a)(2), and directing that a hearing be held as to the motion by respondents for an injunction against action elsewhere involving the same issue between the parties as in the in-

stant action, and that the District Court exercise its discretion with respect thereto (R. 132-137).

No application was made for a rehearing by the Court of Appeals, and the petitioners have seen fit to make this application rather than avail themselves of the remedies designated by the Court of Appeals (R. 132-137).

ARGUMENT

POINT I

The notice of dismissal without leave of Court was not effective to dismiss either the entire action, or to dismiss any claim therein.

(a) ***The notice of dismissal without leave of Court was ineffective to dismiss the action against American Cynamid Company and Berbice Company Limited.***

The record discloses that the litigation involved had passed the point where petitioners could dismiss without a court order under Rule 41 of the Federal Rules. On December 5, 1952, a complaint and motion for preliminary injunction were simultaneously filed (R. 39-41, 55-58). In answer thereto respondent Cyanamid served and filed six detailed affidavits, comprising 43 pages, answering all of the material allegations of the complaint and raising basic issues on the merits (R. 59-104). Thereupon, a five-day hearing on these issues was held before the District Court at which various officials of all respondents (Cyanamid, Berbice, and Reynolds) testified with respect to the basic issues raised, and the Court made findings of fact and conclusions of law adverse to petitioners, including a finding that petitioners' possibility of success on the ultimate trial

of the action "is remote, if not completely nil" (R. 21-23). One month later, after a restraining order against litigating the same issue elsewhere was served upon petitioners, the petitioners sought to "dismiss this action as against all defendants."

Under Rule 41(a)(1) a plaintiff may not voluntarily dismiss an action by filing a notice of dismissal without leave of Court after an answer or motion for summary judgment has been filed. To corstitute an answer as that term is used in the rule, it was not necessary that papers filed by respondents bear the word "answer." *Butler* v. *Denton,* 150 F. (2d) 687 (10th Cir., 1945); *Cf. Pennsylvania Railroad Co.* v. *Daoust Construction Co.,* 193 F. 2d 659, 661 (7th Cir., 1952); *Kilpatrick* v. *Texas & Pacific Railway Co.,* 166 F. 2d 788, 792 (2d Cir. 1948) cert. den'd 335 U. S. 814. Such a technical construction would not be in keeping with the spirit and intent of the rules, which look to substance rather than form. The purpose of Rule 41(a)(1) is "to facilitate the voluntary dismissal of an action, but safeguard against abuse of the right by limiting its application to an early stage of the proceedings." 5 *Moore's Federal Practice* (2d Ed.), p. 1007. Recognizing that Rule 41(a)(1) was concerned with substance rather than form and that the proceedings had gone far beyond the point where petitioners should be permitted to withdraw, the Court of Appeals followed the few existing decisions in which the question has been raised and held that the notice of dismissal without leave of Court was ineffective under the facts of this case.

The record shows that in fact the allegations in the complaint (R. 55-57) were spelled out more fully in the affidavits in support of the motion for a preliminary injunction (R. 43-54), and these allegations not only were fully denied in answering affidavits (R. 59-104), but in oral testimony at a hearing which covered five days and 420

pages (R. 9-11, 18, 21-23, 133). Therefore, in substance, it is clear that the allegations of the complaint had been answered and denied, and as a result thereof the motion for a preliminary injunction was denied with detailed findings of fact and conclusions of law.

Furthermore, petitioners were in any event precluded from dismissing without court order because they then had pending before the Court of Appeals an appeal which they had taken from the District Court's denial of injunctive relief. This appeal was filed in the District Court on December 17, 1952 (R. 123, 133).

The petitioners' appeal could be dismissed, without respondents' consent, only by motion in the District Court under Rule 73(a). If, after perfecting such appeal, petitioners were permitted effectively to dismiss by mere filing of a voluntary dismissal under Rule 41(a)(1), they could easily defeat the whole purpose of Rule 73(a) and destroy jurisdiction over their appeal without the motion required by the latter rule. When both of these rules are read together, it is clear that the perfection of the appeal destroyed any right to dismiss by a mere notice of dismissal.

(b) *The notice of dismissal was ineffective against Reynolds Metals Company.*

Reynolds was permitted to be joined as a party defendant pursuant to Rule 20 of the Federal Rules of Civil Procedure (R. 113, 114) and the amended complaint asserts a separate claim against it which concerns the ownership of the same property as is involved in the claim against Cyanamid and Berbice (R. 105, 112).

Since the notice of dismissal was ineffective against respondents Cyanamid and Berbice, *supra,* it was ineffective against Reynolds for the following reasons:

1. The notice of dismissal seeks to dismiss the entire action and not merely a claim against Reynolds. It states:

> "Please take notice, that the plaintiffs hereby voluntarily dismiss this action as against all defendants."

This notice cannot mean that if it is ineffective to dismiss the entire action, against all defendants, it seeks to dismiss a single claim against one defendant, since that would make the meaning depend, not on the language used, but on the later purposes of petitioners.

2. Rule 41(a)(1) relates to voluntary dismissal of "an action" without leave of court and not to the dismissal of "a claim" against one of the parties to an action.

The procedure for dropping a party to the action is specifically provided in Rule 21 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., which requires an order of the Court and states:

> "* * * Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

The distinction between the words "action" and "claim" as used in the Federal Rules of Civil Procedure is clearly established throughout the rules and by the authorities (R. 135).

> Rules 2, 3, 8, 18, 21, 41, 42, 54(b) of the Federal Rules of Civil Procedure;
>
> *Original Ballet Russe, Ltd.* v. *Ballet Theatre, Inc., et al.*, 133 F. 2d 187 (C. A. 2, 1943);
>
> *Winkelman* v. *General Motors Corporation, et al.*, 48 F. Supp. 490 (S. D., N. Y., 1942);
>
> 1 *Federal Practice and Procedure*, pp. 232, 562.

3. Reynolds is an indispensable party to the action brought by the petitioners as the relief of specific performance sought against Cyanamid and Berbice cannot be granted without Reynolds as transferee of Berbice's assets, being a party to the action (R. 135).

65 *Harvard Law Review* 1050;
Silver King Coalition Mines Co. v. *Silver King C. M. Co.*, 204 F. 166, 169 (C. A. 8, 1913).

The cases permitting the dismissal or dropping of a party from an action allow it only when the party is found to be unnecessary or dispensable.

North Carolina Mining Co. v. *Westfeldt,* 151 F. 290, 296 (C. C. W. D., No. Carolina, 1907);
Jennings v. *United States,* 264 F. 399, 404, 405 (C. A. 8, 1920);
Coffee v. *Planters' Bank of Tennessee,* 13 How. (54 U. S.) 183, 186-190;
Interstate Refineries v. *Barry,* 7 F. 2d 548, 550 (C. A. 8, 1925);
Silver King Coalition Mines Co. v. *Silver King C. M. Co.*, 204 F. 166, 169 (C. A. 8, 1913).

4. Assuming that the notice of dismissal without leave of court was ineffective as against Cyanamid and Berbice, so that the issue of whether or not petitioners obtained a contract right to the property from Cyanamid and Berbice is to be decided here, then, to say that the notice of dismissal was effective against Reynolds so that petitioners are free to bring action against Reynolds in British Guiana involving the same issue of whether petitioners obtained a contract right to said property from Cyanamid and Berbice which takes precedence over Reynolds' rights, would open the door to the danger of conflicting decisions on the same issue. This would be chaotic and highly inequitable, and illustrates the importance of Rule 21 which requires leave of court for dismissal of a claim against a single party.

POINT II

There is no conflict or other special reason for review by this Court.

No grave question of vital general concern to federal litigants is raised by the petition. The question of whether a party plaintiff may withdraw after he has involved others in protracted litigation is one which ordinarily can be disposed of expeditiously by simple motion addressed to the Court. The Court of Appeals held that that procedure should be followed in the present case. Petitioners are avoiding such a motion for the reason that they are fearful of an appeal to the Court's discretion because, having had an adverse determination on the merits, they admittedly propose to harass respondents by institution of costly litigation in British Guiana, which would raise the same issue as between the same parties.

The petitioner has failed to show any conflict between the decision of the Court of Appeals below and applicable decisions of this Court or other federal courts. The authorities cited by petitioners fall into the following categories, all of which are clearly distinguishable from the present case.

(a) Those not involving Rule 41(a)(1):

Cone v. *West Virginia Pulp & Paper Company*, 330 U. S. 212;

Jones v. *Securities and Exchange Commission*, 298 U. S. 1;

Venner v. *Graves*, 255 Fed. 686 (2d Cir., 1919).

(b) Those dealing with preliminary proceedings which were strictly procedural and did not, as here, involve the merits of the controversy:

Pennsylvania Railroad Company v. *Daoust, supra;*
Kilpatrick v. *Texas & Pacific Railway Company, supra;*
Wilson & Company, Inc. v. *Fremont Cake and Meal Company,* 83 F. Supp. 900 (D. C. Neb.);
Sachs v. *Italia Societa Anonima de Navigazione,* 30 F. Supp. 442 (S. D. N. Y., 1939).

(c) Those relating to such inconsequential pre-answer proceedings as to raise no substantial question:

Compania Flomari De Vapores, S. A. v. *American Hellenic Corp.,* 8 F. R. D. 426 (S. D. N. Y., 1948);
Fleetwood, et al. v. *Milwaukee Mechanics Ins. Co.,* 7 F. R. D. 680 (W. D. Mo., 1947).

Petitioners' assertion that the decision of the Court of Appeals is contrary to long established rules is contradicted by decisions of this Court. Under earlier equity practice the right voluntarily to dismiss an action did not extend to cases where an interlocutory decree had been made or cases where the merits of a case had been explored in interlocutory proceedings in which plaintiff sought affirmative relief.

e.g. *Chicago & Alton R. R. Co.* v. *Union Rolling Mill Co.,* 109 U. S. 702;
Pullman's Palace Car Co. v. *Central Transportation Co.,* 171 U. S. 138;
5 *Moore's Fed. Prac.,* pp. 1007-08 (2d Ed. 1951).

It is submitted that the well-reasoned opinion of the Court of Appeals for the Second Circuit is in accordance with existing authority and that the questions do not present any meritorious basis for review by this court.

POINT III

The remand of the respondents' motion for injunctive relief was proper.

Having found that the notice of dismissal without leave of Court was ineffective, the Court of Appeals properly remanded the motion for injunctive relief to the lower court for exercise of its discretion as to the granting or denial of such an application. *Ring* v. *Spina,* 148 F. 2d 647 (C. A. 2, 1945). The District Court failed previously to exercise its discretion, denying the motion on the erroneous impression that the action was dismissed (R. 136).

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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